IN THE COURT OF APPEAL OF NEW ZEALAND

CA137/2009
[2010] NZCA 163

BETWEEN	SAM MURRAY AND BRENDAN TUOHY Appellants
AND	BC GROUP (2003) LIMITED, JOHN MOLYNEUX AND JUDITH SHIRLEY MOLYNEUX First Respondents
AND	ELIZABETH RUTHERFORD Second Respondent
AND	SARAH JUNE STUART Third Respondent
AND	SUSAN MARGARET STOKES Fourth Respondent
AND	HILARY CATHERINE LOW Fifth Respondent
AND	THOMAS PETER GOTT AND JOCELYN ANN CRANEFIELD Sixth Respondents

Hearing: 20 April 2010

Court: Ellen France, Gendall and Cooper JJ

Counsel: P S J Withnall for Appellants
P J Bartlett for First Respondents
J M Morrison for Second Respondent
No Appearance for Third, Fourth, Fifth and Sixth Respondents

Judgment: 4 May 2010 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the first and second respondents costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Gendall J)

[1] Ms Murray and Mr Tuohy sought an order under s 129B of the Property Law Act 1952 requiring their immediate neighbours to provide access to their property, through a right-of-way easement, on the basis that it was landlocked. Those immediate neighbours are the first and second respondents. The remaining respondents, not being directly affected by the application, took no part in the proceedings. The application was dismissed by Joseph Williams J in the High Court at Wellington on 12 February 2009.[1] He held that the appellants' property was not landlocked for the purpose of s 129B.

[2] This appeal is against that decision.

Evidential background

[3] The appellants and their neighbours own adjoining properties in the Wellington hillside suburb of Ngaio. The properties were created by a subdivision in 1963 and are described as Numbers 3 Iwi Street (owned by the appellants), 3A Iwi Street and 4B Fox Street (owned by the Molyneux interests) and 4A Fox Street (owned by Elizabeth Rutherford). The appellants purchased No. 3 Iwi Street in 1989, and have lived there for over 20 years. Although the lot on which their home is built has theoretically frontage to Iwi Street through a narrow strip of land, the strip is less than half a metre wide and does not provide reasonable access. The

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1 *Murray v BC Group (2003) Ltd* HC Wellington CIV-2007-485-198, 12 February 2009.

appellants' property has access via a Council-owned, lit and paved public footpath, which runs between Fox Street and Iwi Street.

[4] The owners of 4A and 4B Fox Street have wider frontage to their respective properties. There is drive-on access from Fox Street to those properties created by the formation of a sealed driveway. They have reciprocal rights-of-way granted pursuant to an easement. Whilst No. 3A Iwi Street does not have actual frontage onto Fox Street, as it is owned by the Molyneux interests it is able to share the right-of-way to No. 4B Fox Street. A cadastral map showing locations of the relevant properties was annexed to the High Court judgment and it is annexed to this judgment (Annexure 1).

[5] Access by the appellants through the public footpath/access way is obtained from the higher Fox Street, by walking downhill over a distance of about 70 metres. Further, it may be obtained from Iwi Street, by a walk over a steeper rise via a zig-zag path of about 75 metres. It would take approximately one to three minutes to access No. 3 Iwi Street when traversing the path from the roadway, although, obviously, longer if a person was carrying a load.

[6] The further factual background is recorded by Joseph Williams J:

> [5] Access arrangements were thus when Sam and Brendan [the appellants] purchased their property 20 years ago. But they are both 20 years older now and they have health problems. Brendan suffers from an eye condition called keratoconus for which he has had two cornea transplants. His eyes, according to Sam who gave evidence on their joint behalf, are very sensitive to light, wind and grit. For her part, Sam injured her back in 2000 and is still being treated for it. Walking is good for it she says – indeed both she and Brendan walk from their offices in central Wellington to and from their home most days. But Sam says she suffers pain from lifting and carrying heavy items such as grocery bags so that gaining access on foot via the Council path as I have described it, can present considerable difficulty on occasion.
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> [6] From shortly after they acquired No. 3 until September 2003, Sam and Brendan say that they gained occasional vehicular access to their property by way of a formed driveway shared by their neighbours at 4A and 4B Fox Street. This helped to alleviate some of the difficulties just described. Both properties adjoin No. 3 on its northern boundary. The driveway is approximately 80 metres long, running from Fox Street and ending at the boundary of 3 and 3A Iwi Street. The driveway straddles the 4A/4B Fox Street boundary line for the greater part of its (the driveway's) length.

....

> [8] Before they purchased their first car in 1992, Sam and Brendan used the driveway to bring shopping and firewood to their property. After 1992 they were given an informal car park at 4B by the then owner, Barbara Cutler, in return for the use of their clothesline which was situated at the rear of Sam and Brendan's property and close to the boundary with 4B. Sam and Brendan did not use the car park every day, but they used it regularly pursuant to the arrangement with Barbara Cutler.
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> [9] On the eastern boundary of No. 3 is 3A Iwi Street ... [That property] and 4B Fox Street also share a 20 metre boundary [and are owned by the Molyneux interests who] now rent both properties to tenants.
>
> [10] On 14 September 2003, the Molyneux' tenants advised Sam and Brendan that they could no longer use the driveway in accordance with the old arrangement with ... the previous owner. They have not used the driveway since.
>
> [11] After 2003 the driveway was extended and modified following an agreement between Elizabeth Rutherford (the owner since 1996 of 4A Fox Street) and John and Judith Molyneux who, ... own both 4B and 3A Iwi Street. This modification and extension provided vehicular access for 3A Iwi Street for the first time. Prior to that time, 3A's access was also via the Council footpath connecting Iwi and Fox Streets.
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> [12] Sam and Brendan were initially very opposed to this extension because it would increase traffic and noise at the rear of their site. In time however their perspective changed. They came to think that they too might be able to use the new driveway by hooking on to the end of it.

[7] It is apparent from the correspondence and exhibits produced in the High Court that the appellants, at least in August 2004, objected to the creation of the sealed driveway, and reciprocal rights-of-way by the Molyneux and Rutherford interests. In a letter to the neighbours Ms Murray said one of the reasons for objection was:

> Vehicle noise will markedly increase with the addition of another household to the driveway. Being away from traffic and traffic noise is one of the best things about our place, and almost unique in a city, and why we purchased our house. A driveway within centimetres of our boundary will seriously impact our enjoyment of our house and property.

Concern was also expressed about the removal of a copper beech tree in the formation of the sealed right-of-way.

[8] The appellants' proceedings were commenced in February 2007 and in the amended statement of claim of 13 August 2007 they contended that their property is

landlocked. They pleaded that the only present means of access to their property is by way of the pedestrian footpath between Fox and Iwi Streets and:

> Such pedestrian footpath is, by reason of its steepness, state of disrepair, lack of lighting, consequential hazardous nature and limitation to only pedestrian access not a means of physical access to the Plaintiffs' land of such nature and quality as is reasonably necessary to enable the Plaintiffs to use and enjoy their land for the purposes for which it may be used under or by reason of the Resource Management Act 1991, including travel to and from their home by vehicle.

They contended that there being no reasonable access their land was landlocked.

The decision of Joseph Williams J

[9] The Judge set out the relevant provisions of s 129B of the Property Law Act 1952, in force at the relevant time. He noted that it was only if he was satisfied that the property was landlocked, that he could go on to consider factors relevant to the exercise of the Court's discretion under s 129B(6) the applicable principles of which were not in dispute. The Judge said that Lot 3 when created was not intended to have vehicle access. It was designed to have foot access only, reflecting the contour of the neighbourhood and the lesser involvement of motor vehicles in the lives of New Zealanders in the 1960s. His Honour said it was a question of degree whether circumstances had changed to make it unreasonable that access only by foot be available to No. 3 Iwi Street and:[2]

> In this case, the question of degree comes down to whether it is reasonable to expect Sam and Brendan to complete a 1-3 minute walk of 70 metres in length and 15 metres elevation up or down a sealed but poorly lit path whenever they wish to access their property. In my view, in the context of the neighbourhood and the topography, access by this means is reasonable.

[10] The Judge considered it was a question of balance and although the tipping point could not be identified with precision:[3]

> ... I am clear that the circumstances of No. 3 fall short of that point. In my view, we have not, in the context of a hilly enclave in a city in which foot access only is relatively common, yet become so reliant on the motor vehicle that a 1-3 minute uphill walk should be seen as unreasonable. Vehicular access remains primarily a matter of convenience for No. 3, and that is not

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2 At [28].
3 At [29].

> enough to enable the Court to utilise s 129B. The evidence of Sam and Brendan's occasional rather than constant use of the informal car park at 4B Fox Street prior to 2003 tends in my view to support this.

[11] Having found that the property was not landlocked Joseph Williams J said that the jurisdiction to grant relief did not exist and he was not required to consider the discretionary factors contained in s 129B(6).

Jurisdiction

[12] Section 129B of the Property Law Act is the remedial provision available to a landowner whose land is landlocked.[4] It relevantly provides:

> **129B Reasonable access may be granted in cases of landlocked land**
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> (1) For the purposes of this section,—
>
> (a) a piece of land is **landlocked** if there is no reasonable access to it:
>
> (b) **owner**, in relation to any landlocked land, means the owner of the legal estate in fee simple, except where the landlocked land is leased to any person for a term of not less than 21 years, in which case the term **owner** means that other person:
>
> (c) **reasonable access** means physical access of such nature and quality as may be reasonably necessary to enable the occupier for the time being of the landlocked land to use and enjoy that land for any purpose for which the land may be used in accordance with the provisions of any right, permission, authority, consent, approval, or dispensation enjoyed or granted under the provisions of the Resource Management Act 1991.
>
> (2) The owner of any piece of land that is landlocked (in this section referred to as the **landlocked** land) may apply at any time to the Court for an order in accordance with this section.
>
> (3) On an application made under this section—
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> (a) the owner of each piece of land adjoining the landlocked land shall be joined as a defendant to the application:
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> (b) every person having any estate or interest in the landlocked land, or in any other piece of land (whether or not that piece of land adjoins the landlocked land) that may be affected if the application is granted, or claiming to be a party to or to

[4] See now ss 326 – 331 of the Property Law Act 2007.

be entitled to any benefit under any mortgage, lease, easement, contract, or other instrument affecting or relating to any such land, and the local authority concerned, shall be entitled to be heard in relation to any application for or proposal to make any order under this section.

(4) The applicant shall, as soon as practicable after filing his application in Court, serve a copy of it on the local authority concerned.

(5) For the purposes of subsection (3) of this section the Court may, if in its opinion notice of the application or proposal should be given to any person mentioned in that subsection, direct that such notice as it thinks fit shall be given to that person by the applicant or by any other person.

(6) In considering an application under this section the Court shall have regard to—

(a) the nature and quality of the access (if any) to the landlocked land that existed when the applicant purchased or otherwise acquired the land;

(b) the circumstances in which the landlocked land became landlocked;

(c) the conduct of the applicant and the other parties, including any attempts that they may have made to negotiate reasonable access to the landlocked land;

(d) the hardship that would be caused to the applicant by the refusal to make an order in relation to the hardship that would be caused to any other person by the making of the order; and

(e) such other matters as the Court considers relevant.

(7) If, after taking into consideration the matters specified in subsection (6), and all other matters that the Court considers relevant, the Court is of the opinion that the applicant should be granted reasonable access to the landlocked land, it may make an order for that purpose—

(a) vesting in the owner of the legal estate in fee simple in the landlocked land the legal estate in fee simple in any other piece of land (whether or not that piece of land adjoins the landlocked land):

(b) attaching and making appurtenant to the landlocked land an easement over any other piece of land (whether or not that piece of land adjoins the landlocked land).

(8) Any order under this section may be made upon such terms and subject to such conditions as the Court thinks fit in respect of—

(a) the payment of compensation by the applicant to any other person; and

(b) the exchange of any land by the applicant and any other person; and

(c) the fencing of any land, and the upkeep and maintenance of any fence; and

(d) the upkeep and maintenance of any land over which an easement is to be granted; and

(e) the carrying out of any survey that may be required by the District Land Registrar before he will issue, in respect of any piece of land affected by the order, a certificate of title free of any limitations as to title or parcels within the meaning of Part 12 of the Land Transfer Act 1952; and

(f) the time in which any work necessary to give effect to the order is to be carried out; and

(g) the execution, stamping, and delivery of any instrument; and

(h) such other matters as the Court considers relevant.

....

[13] The approach required in s 129B cases is well settled. It involves three stages. The Court must:

(a) decide whether the plaintiff's land is landlocked within the meaning of s 129B;

(b) if so, determine how the discretion vested by s 129B in the Court should be exercised; and

(c) if the Court decides to grant access to the landlocked land, it has to determine the terms of any easement, or conditions as to compensation and ancillary orders.

[14] The ordinary meaning of s 129B suggests that land is to be regarded as landlocked if it does not in a practical sense have "reasonable access". They are the key words and the fact that some limited access exists, or could be created is not

enough.[5] There is no presumption in favour of non-interference with another title. The legislation is remedial and:[6]

> The section can only apply to land to which there is no reasonable access. The onus is on the applicant to show that this is the case. The onus is similarly on the applicant to show that, after taking into consideration the matters referred to in subs (6), he should be granted reasonable access to his landlocked land.

Appellants' contentions

[15] Counsel for the appellants did not dispute the applicable principles, but submitted that the Judge erred in applying those to the facts. He contended that the Judge erred by narrowing the focus of his inquiry to whether the pedestrian access that the appellants had was sufficient to be reasonable access. He said that whilst the circumstances in which land may become landlocked are a matter to be considered in the exercise, or otherwise, of the discretion to grant relief, the Judge erred in referring to this factor when determining the jurisdictional issue of whether the land was presently landlocked. Counsel said the proper approach required the Judge to ask what access was reasonably necessary to enable use and enjoyment of the land for domestic residential purposes.

[16] A central feature of the appellants' argument was that reasonable access to enable use of the land for domestic residential purposes required vehicular access. They contend that this is illustrated by the fact that there had been a history of prior use of the driveway over the respondents' land between 1989 and 2003. So, too, the respondents' extension of it, after 2003, to provide vehicular access for No. 3A Iwi Street owned by the Molyneux interests, illustrated that such type of access was reasonably necessary. Counsel said that the topographical features, to which the Judge referred had little bearing on the question of determining jurisdiction. That is because, he said, there already was an existing driveway and all the appellants were seeking was to obtain vehicular use of the same driveway, that had been used from time to time prior to 2003. It was said by counsel that the Judge was distracted by

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5 *Cleveland v Roberts* [1993] 2 NZLR 17 (CA).
6 Ibid, at 24.

considering the nature and quality of the existing pedestrian access and not focusing on whether motor vehicle access was reasonably necessary.

Discussion

[17] It is obvious from the statutory definition that "reasonable access" includes such access as is reasonably necessary to enable a landowner to use the land for the purposes authorised under the Resource Management Act 1991.[7] Evidence was not presented in the High Court as to the District Plan requirements, although we were told by counsel that part of the plan was handed up to the Judge during submissions. Whilst we do not have evidence as to what the District Plan provides, it is obviously a case where the local authority, at the time of subdivision of the lots within this enclave, did not provide for on-site vehicular parking/access/loading spaces, such as in *Brankin v MacLean*.[8] What is contended in this case is that drive-on access up to the appellants' house or boundary to their lot was required, as opposed to parking on the street. But it is clearly not a case where at the time of subdivision such on-site vehicular parking access was required.

[18] It is implicit in the submissions made on behalf of the appellants that without vehicular access, on modern day community expectations and standards, a residential property would not enjoy reasonable access. The appellants rely upon the analysis by Wild J in *Asmussen v Hajnal*,[9] endorsed by *B A Trustees Ltd v Druskovich*.[10] In *Asmussen v Hajnal* Wild J identified the principles emerging from the decided cases as being:[11]

> (a) Reasonable access does not invariably mean vehicular access.
>
> (b) However, nowadays the situations in which non-vehicular access will be regarded by a Court as reasonable are likely to be few, as they are to be determined in the light of contemporary requirements as well as the general topography and nature of the area in question. There are, for example, enclaves of residential land in Auckland and Wellington which do not have, and are never likely to have,

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7 *Brankin v MacLean* [2003] 2 NZLR 687 (HC); *Yullundri Pastoral and Development Co Ltd v Smith Developments Ltd* (2005) 6 NZCPR 868 (HC).

8 Ibid.

9 *Asmussen v Hajnal* (2005) 6 NZCPR 208 (HC).

10 *B A Trustees Ltd v Druskovich* [2007] NZCA 131, [2007] 3 NZLR 279.

11 At [58].

vehicular access. They include Karaka Bay in Auckland and parts of the historic zone in Thorndon, Wellington.

(c) Full recognition of the very great dependence people now have upon the motor vehicle must be given. The utility to people's lives through being able to drive their vehicle upon their land cannot be underestimated.

(d) There is no force in a defendant proving that there are other residential properties in the locality without vehicular access, as each case must be assessed on its individual merits.

[19] But as *B A Trustees v Druskovich* says, the type of relief which is necessarily reasonable access under s 129B does not necessarily include vehicular access and it is in that context that the Court of Appeal endorsed Wild J's summary in *Asmussen*. As the Court of Appeal said:[12]

> ... reasonable access under s 129B does not necessarily include vehicular access. The access must be reasonable, not the best that could be achieved. What is "reasonable" must be determined in light of factors such as the characteristics of the locality (residential, commercial or mixed), the topography of the area and contemporary requirements in relation to transportation.

[20] We do not accept that the Judge ignored the question of what was reasonably necessary. He considered that issue. We cannot accept that it is necessarily the case that under modern day community standards vehicular access onto the site of a residential property is necessary for it to enjoy reasonable access. Whether a property is landlocked is a value judgment that the Court has to make after taking into consideration all the evidence. As was the case in *Kingfish Lodge (1993) Ltd v Archer* "physical access" in s 129B(1)(c) refers to access in fact.[13] Factual situations are decisive and as happened in that case there was neither pedestrian access nor vehicular access. But access by water was determined to be reasonable. It cannot be the law that without access by foot – or by motor vehicle – a property is landlocked and it all depends upon what practical access exists to the property in question and whether that is reasonable.

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12 *B A Trustees v Druskovich* [2007] NZCA 131, [2007] 3 NZLR 279 at [61].
13 *Kingfish Lodge (1993) Ltd v Archer* [2000] 3 NZLR 364 (CA).

[21] In *Asmussen v Hajnal* Wild J held that on the facts of the case reasonable access meant vehicular drive-on access so that the closing of an existing driveway meant that there was no reasonable access to the plaintiff's property, but that was a case where such property had always enjoyed vehicular access. The right-of-way then recorded on the title was consistent only with vehicular access where the local body no longer permitted subdivision for residential purposes unless each case had drive-on access. That was not the evidence in this case.

[22] In *Hutchison v Milne* Savage J said that reasonable access might not invariably mean vehicular access. However, counsel for the appellants says that that decision had to be viewed against community expectations at the time in relation to motor vehicle use.[14] In *Sayes v Wentworth* Robertson J when dealing with whether reasonable access meant vehicular access said that:[15]

> ... the circumstances in which non vehicular access will be sufficient must be determined in the light of contemporary requirements and the general topography and nature of the area in question. There are desirable residential enclaves in Auckland, such as Karaka Bay, which do not have and are never likely to have vehicular access. Such areas could not sensibly be described as landlocked in terms of this provision. In a hilly area such as Wellington, ability to get vehicular access onto a property will be less common than in an area of more moderate terrain.

[23] Obviously, if people cannot get onto their property it has no reasonable access. If they can access it from a public roadway or walkway through a suitable pedestrian route then such access may be reasonable, depending on the circumstances.

[24] The fact that a property owner, when acquiring it, knew that there may be access difficulties does not preclude them from obtaining relief under s 129B in respect of those difficulties, but in the present case the appellants acquired their property after the subdivision, aware that access via the pathway vested in the Council was all that existed and direct vehicular access from the road was not available. There was evidence before the High Court that this was seen by them to be a positive benefit to the property, with its seclusion amongst lush bush being an

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14 *Hutchison v Milne* [1980] 2 NZLR 568 (HC).

15 *Sayes v Wentworth* HC Auckland M1817/90, 12 November 1993 at 21.

attraction. We do not think it was in error for the Court to have regard to that fact, namely what sort of access existed when the property was acquired. Whilst this is a consideration to which the Court must have regard when exercising discretion to grant or refuse relief once jurisdiction exists, it does not necessarily follow that, in determining the question of reasonableness of access, the circumstances that existed when the land was acquired must be ignored. Awareness of the type of access that existed when acquiring a property may be seen as a piece of evidence relevant to whether a purchaser regarded such access as reasonable.

[25] The appellants argued that their use of the driveway was evidence of such access being necessary and reasonable, whether or not it was "occasional" as the Judge said. We do not think that adds anything to the appellants' contentions. It may have been beneficial, convenient, and indeed reasonable, but it does not mean that access which existed through the public right-of-way was unreasonable access.

[26] As can be seen the cases largely turn upon their individual facts. Just as in *Kingfish Lodge*, the focus has to be on the adequacy and reasonableness of the access which now exists. Here there was evidence of access from two streets, above and below the appellants' home, through a public Council-owned walkway which had been utilised over many years. There was evidence from the respondents that this was typical of access to properties in hilly suburbs of Wellington and indeed, Savage J in *Hutchison v Milne* referred to a public access way consisting largely of steps as being "a common form of public access way in Wellington".[16] Likewise, in *Evison v Johnson* Davison CJ said:[17]

> ... in Wellington City generally, there would be many properties where access from the area where a vehicle stops to the house is gained by a path or steps over a sloping area of ground.

[27] Joseph Williams J undertook a view. He correctly recorded the applicable principles, observing that what was reasonable was a question of fact. In determining the factual matters he had the benefit of that view and he had ample evidence to enable him to reach the conclusion that, as a matter of fact having regard

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16 At 569.

17 *Evison v Johnson* (1984) NZCPR 181 (HC) at 188.

to contemporary standards, the present access was reasonable and that vehicular access was primarily a matter of convenience for the appellants. We agree. The onus was on the appellants to establish that the land is landlocked and that a grant of relief is appropriate. They failed to discharge that onus. Nothing has been advanced to us to persuade us to take a different view from that of the Judge.

[28] For those reasons we uphold the judgment of the High Court and the appeal is dismissed.

[29] The first and second respondents are entitled to costs for a standard appeal on a band A basis together with usual disbursements.

Solicitors:
Michael Chung Law Office, Wellington for Appellants
I D Hay, Wellington for First Respondents
Gillespie Young Watson, Lower Hutt for Second Respondents

ANNEXURE 1

ANNEXURE SHOWING 3 IWI STREET AND SURROUNDING PROPERTIES AND COUNCIL FOOTPATH